File No. S/M/31/13

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

Dr. Alan Cockeram v. College of Physicians and Surgeons (N.B.) 2013 NBQB 197

Date: 2013/06/10

IN THE MATTER OF AN APPLICATION FOR A TEMPORARY PROHIBITIVE INJUNCTION PURSUANT TO RULE 69.13 (4) OF THE RULES OF COURT AND SECTION 33 OF THE JUDICATURE ACT

BETWEEN:

DR. ALAN COCKERAM

Applicant

- and -

COLLEGE OF PHYSICIANS AND SURGEONS OF NEW BRUNSWICK

Respondent

DECISION

BEFORE:	The Honourable Mr. Justice John J. Walsh
AT:	Saint John, N.B.
ON:	May 29, 2013
POST HEARING BRIEFS:	June 5, 2013
DECISION:	June 10, 2013
COUNSEL:	Catherine A. Fawcett and Nathalie L. Godbout, for the Applicant John P. Barry, Q.C. and Patrick J.O. Dunn, for the Respondent

INDEX

Walsh J:

I. Introduction and Issues

[1] The applicant is a medical doctor in the City of Saint John. He has applied for temporary injunctive relief to prohibit the College of Physicians and Surgeons of New Brunswick (hereinafter referred to as the "College") from embarking on an investigation into a number of complaints made against him until concurrent criminal proceedings are disposed at trial(s).

[2[Currently, the applicant faces charges of sexual assault arising from the criminal complaints of nine (9) former patients. Concurrently, nineteen (19) former patients have made complaints to the College. The College has referred the matter to its "Complaints and Registration Committee" (hereinafter referred to as the "Complaints Committee"), which under the *Medical Act* has the powers to investigate, make findings and submit recommendations to the governing Council of the College. The Committee is awaiting written responses to each of the complaints, which the applicant is required to file with the College. He has not yet done so.

[3] In these types of situations a procedural tension arises:

> ... there is the double adjudication to be made when transgressions of a certain standard are alleged against members of a profession. If a doctor is accused of sexual impropriety there is a dual interest. The standard of the criminal law is applied to see whether the impropriety amounts to sexual assault. At the same time, the professional governing body has an interest in maintaining the standard of practice in that profession. In all these situations of dual responsibility where criminal charges are possible, a difficult decision arises. Is it a fairer course to endeavor to finalize the disciplinary proceedings before the criminal charges or to wait until they've finished? ...
>
> (***Brunelle v. Canada (Royal Canadian Mounted Police – RCMP)*** (1991) 81 D.L.R. (4th) 153 (Fed. Ct. T.D.))

[4] The applicant has brought this Notice of Application to prohibit and enjoin the College from requiring him to submit responses or considering or investigating the present complaints or any future similar complaints made to them "pending the conclusion of the trial of the related criminal complaints and charges ..., or further order of the Court." He seeks this temporary relief because he says that if he is required to comply with his obligations to the College and if the

Complaints Committee embarks on an investigation while criminal charges related to the same subject matter are outstanding his right to a "fair trial" of the criminal charges will be jeopardized.

II. Background and Facts

[5] The applicant, Dr. Alan Cockeram, is a specialist in Internal Medicine and Gastroenterology who has been licensed to practice medicine in the Province of New Brunswick since 1984. As such, he is a member of the College of Physicians and Surgeons of New Brunswick.

[6] The respondent, the College of Physicians and Surgeons, was created by the New Brunswick *Medical Act*. The statutory objects of the College "include regulating the practice of medicine, having its members maintain standards of medical knowledge and skill, and maintaining standards of medical practice in order to serve and protect the public interest" (See: *Medical Act, s. 5 (3)*).

[7] On May 8, 2012 the applicant gave notice to the College, as he was required, that he had been criminally charged with a sexual offence alleged to have been perpetrated on a female patient. Because the College had not received a complaint from that patient, the College "maintained a watching brief on the criminal proceedings ... and awaited further information to determine if any action was required pursuant to its duty to protect the public interest".

[8] This all changed between late December 2012 and the end of January 2013 when the floodgates opened. The College received complaints from six former patients alleging sexual impropriety by the applicant in the course of medical examinations. On January 31, 2013 the College, following its policy and procedure, sent, by letters to the applicant, the following notification in regard to each of the complaints:

> *You are advised that [name redacted] has filed a complaint with this office, a copy of which is enclosed.*
>
> *Under College Regulations, you are required to respond to the complaint in order to assist the Complaints Committee in assessing the matter.*
>
> *You should be further advised that it is College policy to require this response within thirty (30) days. However, if there are extenuating circumstances, such as the complexity of the matter or vacation, please*

advise the office and a further thirty days will be allowed.

In preparing your response, please respond to each specific allegation contained in the complaint. To further assist you, enclosed please find a copy of advice from the CMPA on responding to a complaint. You should be aware that in most circumstances a copy of your response will be provided to the complainant. You should also be aware of the following provision of the Medical Act.

> *71.2(2) No record of a proceeding or investigation under this Act, no report document or thing prepared for or statement given at a proceeding or in the course of an investigation under this Act, and no order or decision made in a proceeding under this Act, is admissible as evidence in a legal proceeding other than a proceeding under this Act.*

With your response please include copies of any documentation in your possession which may be relevant to the matter.

When all relevant material is available, the matter will be presented to the Complaints Committee at its next meeting. As the Committee meets approximately every three months, it can take several months to conclude the matter. Enclosed for your information is a general discussion of the complaints process with the College.

(Emphasis added)

(*Record on Application* at p. 24)

[9] On February 7, 2013 a seventh (7th) complaint was forwarded to the applicant. Also on that date, the College's Executive Committee ordered, as an interim measure, that the applicant's "*medical licence be restricted such that he be precluded from any clinical activity involving female patients and that all outstanding matters be referred to the Complaints Committee*". The applicant does not take issue with the restriction on his licence given the circumstances. As also ordered by the Executive Committee, the matter was put in the hands of the Complaints Committee for investigation.

[10] More complaints were received. At present a total of nineteen (19) complaints by former patients have been lodged with the College against the applicant. As I understand, all allege 'sexual abuse' during varying kinds of medical examinations. The complaints cover various periods, from as late as 28 years to as recent as 1.5 years ago. Of those, the applicant currently faces sexual assault charges on the complaints of nine (9). However, the supplemental affidavit of the applicant reveals a high probability of an additional twelve (12) charges being laid. It is

also probable that these expected additional criminal charges will relate to the remaining College complainants.

[11] On the current criminal charges a 'preliminary inquiry' in the Provincial Court has yet to be scheduled.

III. Actions Sought to be Enjoined

[12] As mentioned above, these complaints submitted to the College by the applicant's former patients are now before the Complaints Committee for investigation. An overview of the powers and process of this Committee was provided by Counsel for the College:

> The Complaints and Registration Committee has its own investigative powers under s. 57 of the Medical Act. Following its investigation, the Complaints and Registration Committee will make a report of findings and recommendations to Council of the College. It may recommend one of a number of things:
>
> (a) No further action be taken;
> (b) The complaints be referred to a Board of Inquiry;
> (c) Dr. Cockeram be cautioned, counseled or censured; or
> (d) Any other recommendations it considers appropriate.
>
> At this current early investigative stage, the College's proceedings involving Dr. Cockeram are not public. Only the Registrar, counsel for the College, the members of the Complaints and Registration Committee, and the complainants will have access to Dr. Cockeram's responses to complaints.
>
> (Emphasis added)
>
> (*Respondent's Pre-Hearing Brief*, at paras 23-24)

[13] I note that the investigative powers of the Complaints Committee alluded to above are very extensive (See: *Medical Act 57 (7)*). This Committee also has the authority to appoint one or more investigators to assist them (*Medical Act, s. 55.2*). And, I notice that any such investigator(s) wield considerable investigative powers (See: *Medical Act, ss. 55.2 (2); s. 55.3 (1); s. 55.2 (2) - (4); s. 55. 4 (1) – (3)*).

[14] From the pleadings, the main concern of the applicant is on that part of the Committee's investigative process requiring that he "respond appropriately [and] within a reasonable time to

a written inquiry of the Registrar, Council, a committee of the College, or their agents" (*Medical Act, Regulation 9, s. 27*). As seen in the notifications sent to the applicant set out and underscored earlier, the Registrar requires the applicant *to respond to the complaint(s) within 30 days in order to assist the Complaints Committee in assessing the matter and that he respond to each specific allegation contained in the complaint(s) and that he include copies of any documentation in his possession which may be relevant to the matter.* According to the legislation, a failure to do so constitutes professional misconduct under *Part II* of the *Medical Act* for which he could suffer sanction, including loss of his medical licence (See: *Medical Act, ss. 3, 56* (c); *Regulation #9, s. 27* (*Professional Misconduct*)).

[15] The *Medical Act, s. 57 (5)* (a), obligates the Complaints Committee to consider and investigate within 120 days. When this Application for injunctive relief was filed, the College voluntarily stayed their demands on Dr. Cockeram to respond and have delayed embarking upon the investigation. The parties await the Court's decision. Time is of the essence.

IV. Applicant's Position

[16] The applicant's position is delineated in his Notice of Application as follows:

> Dr. Cockeram is afraid that, if he is required to respond to the College complaints before the criminal charges have been disposed of, he will jeopardize his right to a fair trial in that:
>
> (a) He will be required to respond to "every allegation" in all of the complaints though he has not yet received full disclosure pertaining to the criminal charges against him;
>
> (b) Dr. Cockeram's right to remain silent in the face of the criminal charges will be jeopardized if he is required to make a full answer to the College complaints at this time;
>
> (c) In the criminal proceedings, Dr. Cockeram has the right to know the case against him before being required to make any answer or defence. Requiring him to respond to "every allegation" contained in the College complaints deprives him of this right;
>
> (d) Should Dr. Cockeram be convicted of the sexual assault of even one patient, the College may find him guilty of professional misconduct pursuant to section 56 of the Medical Act, supra, based on the conviction alone;

> The College would not be prejudiced by a stay pending the final disposition of the criminal proceedings against Dr. Cockeram, as the College will may seek to proceed with all of the complaints against Dr. Cockeram regardless of the outcome of the criminal charges, should it determine that it is necessary to do so;
>
> The public interest pending resolution of the criminal charges and complaints against Dr. Cockeram has already been adequately addressed by the condition placed on his license by the College that he not treat female patients until disposition of the criminal charges and the complaints against him.
>
> (Emphasis added)
>
> (*Notice of Application* at paras. 25-27)

[17] As well, the applicant claims that "should the College's investigation not be stayed or otherwise held in abeyance pending the resolution of the criminal charges against Dr. Cockeram, he will be severely prejudiced and suffer irreparable harm as a result of the impairment of his right to a fair trial" (*Notice of Application* at para. 31).

V. Respondent's Position

[18] The College's position is set out in the affidavit of its Registrar, Dr. Schollenberg:

> The College does not wish to delay further consideration, investigation, or steps or actions in respect of the complaints against Dr. Cockeram pending final disposition of all criminal complaints and charges filed against him as requested in his Notice of Application dated April 15, 2013.
>
> The College, and the public interest which it is mandated to serve and protect, would be prejudiced if it were stayed, prohibited, or enjoined from further considering or investigating the complaints against Dr. Cockeram. The College is concerned that:
>
> a. The former patients of Dr. Cockeram who have made complaints to the College deserve to have responses to them and to have the matters fully investigated.
>
> b. If any additional matters of concern were revealed in the course of investigating these current complaints, the College would be prevented from investigating them or taking any further steps to protect the public.

c. The criminal proceedings against Dr. Cockeram are of uncertain and potentially significant duration given the number of charges, and may require the College to wait years before pursuing its investigation. The ultimate result of the criminal proceedings is also uncertain. This delay may prejudice the College as records may be lost or destroyed, memories may fade, and complainants and witnesses may become unavailable. Two of the complainants are currently aged 72 and 73, respectively.

d. Furthermore, the College is concerned that, if it takes no further action, in the event the criminal proceedings do not result in a conviction against Dr. Cockeram, which alone would be grounds for a finding of professional misconduct to section 56 of the Medical Act, the College may be prevented from pursuing proceedings on the merits of the complaints at that time because of unreasonable delay.

The College is concerned with the breadth of the order sought with respect to any future complaint made to the College against Dr. Cockeram. The requested restriction on the College's considering or investigating or taking any steps or actions in respect of any future complaint, even if related to the current criminal charges against Dr. Cockeram, unless it made a formal Application of the Court of Queen's Bench, would unduly delay and interfere with the College's ability to carry out its role in protecting the public interest as mandated by the Medical Act.

(at paras. 37-39)

[19] Alternatively, Counsel for the respondent argued that if the Court were to prohibit the College from requiring Dr. Cockeram to respond to the Registrar's demands, the Court should not also enjoin the College's Complaints Committee from nevertheless proceeding with its investigation given the College's public interest mandate.

VI. Legal Analysis

A. Authority

[20] The Applicant has pleaded the *Rules of Court, r. 69.13 (4)* (*providing for an order by way of Judicial Review prohibiting a tribunal or authority from proceeding further in a matter*) and the *Judicature Act, s. 33* (*providing that "an order on judicial review or an injunction may be granted ... by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made"*). As to any distinction between a prohibition and an

injunction, in a leading text on the subject of injunctions the author notes that after the passage of the Judicature Act in England it was judicially determined that:

> If I can grant a prohibition I can of course grant an injunction between the parties.
> ...
> Now, if I have the power to grant prohibition in a particular case, it certainly is "just and convenient" to arrive at the same result by granting an injunction *inter partes*, instead of creating the great expense of granting a writ of prohibition against the magistrates.
>
> (Mr. Justice Robert A. Sharpe, *Injunctions and Specific Performance*, Canada Law Book, Loose Leaf Edition, citing at para. 3.930, ***Hedley v. Bates*** (1880), 13 Ch D. 498 at 502)

[21] In my view, the most appropriate remedy, if one is to be granted, is by way of a temporary "prohibitive injunction" (See: R.J. Sharpe, *Injunctions and Specific Performance*, infra at paras. 1.20, 3.910). An interlocutory injunction is a "discretionary equitable remedy" (***MR Martin Inc. v. Bryn Holdings Ltd.*** 2010 NBCA 48 at para. 17).

B. Analytical Approach

[22] The matter is not only serious; the questions raised are difficult and some aspects are complex. The parties could not find any reported case in New Brunswick on point.

[23] The Court is asked by the applicant to stop his own professional governing body, pending any criminal trials, from performing its public interest mandate to inquire into his fitness to practice medicine despite the complaints made to it.

[24] In other words, the Court is being asked to enjoin the College from exercising a jurisdiction given to it by law. I adopt the view expressed that in such a circumstance the test formulated in ***RJR-MacDonald Inc. v. Canada (Attorney General)*** [1994] 1 S.C.R. 311 governs the Court's exercise of discretion, because such "unusual relief ... requires satisfaction of a demanding test" (R.J. Sharpe, *Injunctions and Specific Performance*, supra (Release No. 21, November 2012;), citing ***Mylan Pharmaceuticals ULC v. Astrazeneca Canada, Inc.*** (2011) 426 N.R. 167 (F.C.A.)). The applicant accepts that this should be the test. The respondent does not.

[25] The College argues that the appropriate test in circumstances of parallel proceedings as here is that of "exceptional or extraordinary circumstances", as applied in ***Falloncrest Financial Corp. v. Ontario*** (1995) 27 O.R. (3d) 1 (Ont. C.A.). That case involved an application to stay civil proceedings pending the completion of criminal proceedings. However, the case is readily distinguishable on the facts. The party moving for the stay was the Crown; the Court specifically noting that the accused's rights were not in issue. Nevertheless, I agree that the case favours the respondent:

> The cases are clear that the threshold test to be met before a stay is granted is high. The mere fact that criminal proceedings are pending at the same time as civil proceedings is not sufficient ground for a stay of the latter ... Even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self-incriminating evidence is not necessarily exceptional ... This high threshold should not be relaxed ... An applicant, whether it is the Crown or the accused, must meet the same burden of proving extraordinary or exceptional circumstances...
>
> (at para. 16)

[26] However, I note that neither ***Manitoba (A.G.) v. Metropolitan Stores Ltd.*** [1987] 1 S.C.R. 110; ***RJR-MacDonald v. Canada (Attorney General)***, supra or, ***Phillips v. Nova Scotia (Commissioner, Public Inquiries)*** [1995] 2 S.C.R. 97, a case to be more extensively referred to shortly, were mentioned. And, it was in the seminal decision of ***Metropolitan*** stores that the Supreme Court stated "a stay of proceedings and an interlocutory injunction are remedies of the same nature" and should be, in the absence of a different test prescribed by statute, governed by the same rules (at para. 30). For these reasons, I respectfully decline to follow the ***Falloncrest*** decision in the present circumstances.

[27] Nor have I been convinced that a multi-part test formulated in ***White v. E.B.F. Manufacturing*** [2001] F.C.J. No. 1073, and recently applied in ***Tractor Supply Co. of Texas, LP v. TSC Stores LP*** 2010 FC 883; aff'd 2011 FCA 46, is more appropriate than the *RJR-MacDonald test* in the circumstances here. Counsel for the College fairly conceded that this test "does not capture all of the considerations that occur where one of the two parallel proceedings is a criminal proceeding and could not be applied directly in the instant case" (*Respondent's Post Hearing Brief* at para. 16). In any event, in that case the learned justice, out of caution, alternatively conducted an analysis under the *RJR- MacDonald test*. And, on appeal the Court noted this very fact, without deciding.

[28] Although the question of the correct test in the circumstances of this case is not without some doubt, in my respectful opinion the *RJR-MacDonald test*, modified to the extent necessary to fit the case to the framework, offers the most appropriate analytical vehicle to guide this Court (See e.g. ***Gore v. College of Physicians and Surgeons (Ontario)*** 2009 ONCA 294).

C. Analytical Application

[29] That the relief sought by the applicant here would be "unusual" is borne out by the law:

> There is ample scope to the disciplinary power of professions even where criminal charges have also been laid. Its exercise is not dependent on conviction nor excluded because the conduct constitutes an indictable offence; nor barred even by an acquittal, certainly if the acquittal is on a technical ground; equally, a disciplinary penalty does not bar criminal charges and disciplinary hearing is not precluded or suspended because criminal charges are pending.
>
> (James T. Casey, *The Regulation of Professions in Canada*, Carswell (Looseleaf; updated to 2012, Release No. 2)

[30] "The weight of authority appears to be in favour of allowing disciplinary proceedings to go ahead" (Manuel and Donszelmann, *Law of Administrative Investigations and Prosecutions*, Canada Law Book, 1999 at p. 154; See e.g.: ***Voutsis v. College of Physicians and Surgeons*** (Sask.) (1987), 57 Sask. R. 60 (Q.B.); ***Whyte v. Provincial Medical Board*** (1980), 40 N.S.R. (2d) 650 (T.D.); See also: Murdoch and Brockman, *Who's on First? Disciplinary Proceedings by Self-Regulating Professions and Other Agencies for "Criminal Behaviour"* (2001) 64 Sask. L. Rev. 29 at pp. 50-53). However, there have been exceptions.

[31] For example, in ***S. (S.J.) v. College of Physicians & Surgeons (Saskatchewan)*** (1998) 162 D.L.R. (4th) 759 (Sask. Q.B.) the Court stayed the College's disciplinary hearing against a doctor pending his interrelated trials on sexual assault charges. Although it was significant to the Court in that case that the doctor was at the time suspended from practicing medicine, which from a public interest perspective makes it distinguishable from the situation here, at this juncture it is the reference by the Court to the judicial exercise of discretion in contexts such as these that particularly commends the case to me:

> .... I am, however, respectfully of the opinion that the right to exercise a discretion should not be curtailed by any inflexible rule of law, but should be guided in each instance by the merits of the matter under review. I am

> convinced that a judge, whose duty it is to exercise the discretion, has not only an inherent right to do so, but where the attainment of justice demands, an obligation and an unfettered right to do so, subject to any limitations imposed by statute or the rules of court ...
>
> (Citing, at para. 11, ***Leier v. Schumiatcher*** (No. 2) (1962), 39 W.W.R. 446 (Sask. C.A.))

[32] I earlier concluded that the so-called "*RJR-MacDonald test*" formulated for injunctions and stays provides the best guidance in the exercise of my discretion in this case. It is a well known tripartite inquiry: 1. Is there a serious issue to be tried? 2. Would irreparable harm be caused if the injunction is not granted? 3. Who does the balance of convenience favour (including public interest considerations)? (See: ***RJR-MacDonald v. Canada (Attorney General)***, supra at paras. 43-64).

[33] Before embarking on that analysis, it is important not to lose focus on the Court's ultimate task in light of that test. It has been explained that the Supreme Court's *RJR-MacDonald* test "should be regarded as a framework" and that "the ultimate focus of the court must always be on the justice and equity of the situation in issue" (***Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*** (2011) 341 D.L.R. (4th) 407 (Sask. C.A.) at para. 26).

[34] With that caution in mind, I begin by asking - what is at risk here, for both parties? Ostensibly, there appears from the competing claims an imminent collision of public interests.

[35] On one side there is the sedulously fostered public interest of a "fair trial" in criminal proceedings for every person charged with an offence, specifically recognized in *Section 11 (d)* of the *Charter of Rights and Freedoms*, built on the presumption of innocence and encompassing "the single most important organizing principle in criminal law, the right of an accused not to be forced into assisting in his or her own prosecution" (See: ***R v. P. (M.B.)***, [1994] 1 S.C.R. 555 at paras. 37-41).

[36] On the other side there is the respondent's vital and independent legal duty as a self regulating professional organization to protect the public interest by governing over its membership (See: ***Kenney v College of Physicians and Surgeons of New Brunswick*** (1993) 141 N.B.R. (2d) 76 (Q.B.) at paras. 12-13).

[37] Without jumping the ***RJR- MacDonald*** analysis, what is immediately apparent, as a matter of trite law, is that in any conflict between a criminally accused person and his or her professional regulator, that person's right to a "fair trial" in the criminal proceeding must remain sacrosanct. The College, of course, has not argued otherwise. Indeed, the constitutional dimensions of the right to a fair trial as much as any other right under the *Charter of Rights and Freedoms*, speaks of our society – who we are as a people. And, the 'principle against self-incrimination' is at the core of our concept of "fair trial":

> This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, until the Crown establishes that there is a "case to meet', an accused is not compellable in a general sense (as opposed to the narrow testimonial sense) and need not answer the allegations against him or her.
>
> (***R v. P. (M.B.)***, supra at para. 37)

[38] The thorny question remains though, what are the risks to Dr. Cockeram's fair trial interests in the criminal courts by reason of the obligations of his membership in the College of Physicians and Surgeons?

i.) Is there a serious issue to be tried?

[39] It seems to me that by fashioning the question, as I have, in terms of the public interests at stake, this provides the answer at the first step of the *RJR- MacDonald test*. In my opinion there is a "serious question to be tried", "the application is neither vexatious nor frivolous" (***Imperial Sheet Metal Ltd. v. Landry*** 2007 NBCA 51 at para. 51). In any event, this threshold is intended to be a low one (***RJR-MacDonald v. Canada (Attorney General)***, supra at para. 49).

[40] In reaching this conclusion I have had to recognize that the Supreme Court test was formulated in the context of *inter partes* proceedings, that is to say, that typically there would be a main legal action contemplated or ongoing between the parties, one of whom applies for injunctive relief against the other to protect their interests pending the trial of that action (See e.g. ***MR Martin Inc. v. Bryn Holdings Ltd.***, supra). In such a circumstance the reference to the question of whether there is a serious issue to be tried relates to the underling action (See:

Greenlaw v. Lanteigne 2013 NBQB 028 at para. 3). This is not, strictly speaking, the case here. Here there are parallel proceedings ongoing, one involving the applicant and the Crown and the other between the applicant and the College. The injunctive relief sought relates to prohibiting certain activities in the proceeding between the applicant and the College so as to prevent perceived harm in the separate and parallel proceeding involving the applicant and the Crown.

[41] This difference does not invalidate the application of the *RJR-MacDonald test*. Rather, I view it as simply fitting the framework to the specific circumstances. In doing so I am emboldened by the broad statement in ***RJR-MacDonald*** that the test "should be applied to applications for interlocutory injunctions and as well for stays in both private and Charter cases" (at para. 77).

ii.) Would irreparable harm be caused if the injunction is not granted?

[42] Moving to the second step requires the Court to drill down to uncover in what way, if at all, the applicant's right to a "fair trial" in the criminal court would be threatened if temporary injunctive relief is not granted against the College. In the context of the *RJR-MacDonald test* the question becomes the nature of the harm that could be suffered (See: ***Leby Fixtures & Interiors (Receivership), Re*** (2006), 305 N.B.R. (2d) 199 (C.A.) at para. 38). This task is a difficult one of prediction:

> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet* – because he or she fears – and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of the harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction. Thus, while all injunctions involve predicting the future, the label *quia timet* and the problem of prematurity relate to the situation where the difficulties of prediction are more acute in that the plaintiff is asking for injunctive relief before any of the harm to be prevented by the injunction has been suffered.
>
> (R.J. Sharpe, *Injunctions and Specific Performance*, supra at para. 1.670)

[43] In tackling this question, and the preliminary incidental question of standard of proof that necessarily arises, it is important to again identify the applicant's specific claims.

[44] In summary, Dr. Cockeram says that the College's demands that he respond to the various complaints will put his right to a fair criminal trial(s) at risk, as will the Complaints Committee's investigation. Although I will address each in turn, both claims are connected by an implicit legal assertion: that unless the Court enjoins the College in these two regards there is a "sufficiently serious risk" of a "prospective or anticipated *Charter*" violation. I will explain.

[45] ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, [1995] 2 S.C.R. 97 is a case where the applicants applied for, *inter alia*, an injunction to prevent the public inquiry from proceeding on the grounds that their fair trial interests in separate proceedings would be impacted. Five justices of the Supreme Court decided the issue strictly on a factual ground. However, three justices led by Cory J. and concurred in by Iacobucci and Major JJ. (L' Heureux-Dube' J. concurring in result) addressed the legal issues arising. Cory J. wrote:

> ... It is true that relief may be granted for a prospective Charter violation ... However, relief will only be granted in circumstances where the claimant is able to prove that there is a sufficiently serious risk that the alleged violation will in fact occur...
>
> (Emphasis added)
>
> (at para. 108)

[46] Actually, Cory J. went on to review the terminology employed in other cases decided in that context, concluding:

> Thus the applicable standard may fluctuate between the requirement of a "real and substantial risk", a "high probability" or even a "virtual certainty" of a Charter breach depending upon all the circumstances presented by the particular case and the particular applicant.
>
> (at para. 111)

[47] Although the parties here did not address the issue of the appropriate standard, the important preliminary question for this Court is how that standard(s) of proof can be reconciled with the second step (risk of irreparable harm) of the *RJR-MacDonald test*. In the context of injunctions generally it has been recently observed that:

> ... it is readily apparent that Canadian courts have no fixed view of how this matter should be approached. I will not refer to the full range of

> authorities on point beyond noting that they span a wide spectrum. On one extreme, the New Brunswick Court of Appeal has said that irreparable harm is not a condition precedent to granting injunctive relief and, as a result, it is unnecessary to identify any required standard of proof in relation to it: See: *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51, ... McLachlin J.A. (as she then was) described the appropriate test as follows in *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C.C.A.) at p. 345:
>
> > It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction.
>
> Moving further down the spectrum, Ritter J.A., of the Alberta Court of Appeal, has said "[t]he proper approach is to assess whether or not it is probable that irreparable harm will be suffered". See: *Wang v. Luo*, 2002 ABCA 224 at para. 17. At the far end of the range, there are decisions of the Federal Court of Appeal indicating that "evidence as to irreparable harm must be clear and not speculative." See, for example: *Syntex Inc. Novopharm Ltd.* (1991), 126 N.R. 114 (F.C.A.) at para. 15.
>
> The leading Supreme Court of Canada decisions do not serve to clarify the situation. ...
>
> (Emphasis added)
>
> (***Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership***, supra at para. 51-52)

[48] First of all, our Court of Appeal in ***Imperial Sheet Metal Ltd. v. Landry***, supra was addressing the *RJR-MacDonald test* in the context of an employment contract case, not the context here, of parallel proceedings involving two ostensibly competing public interests, one of which involves constitutional law implications. Consequently, the Court would have had no need to refer to ***Philips v. Nova Scotia***, supra. In these regards, ***Imperial Sheet Metal Ltd. v. Landry*** is, in my respectful opinion, distinguishable.

[49] Secondly, our Court of Appeal's rationale for adopting the approach underscored above was because the second step of the *RJR-MacDonald test* would otherwise become a threshold if a standard of proof was dictated. The Court's concern was that this would be inconsistent with the overall framework of the test formulated in ***RJR-MacDonald***, supra, because setting a threshold would be contrary to the tests requirement – i.e., as a general rule the third step (Balance of Convenience) must be considered regardless of the findings under the second step. A passage from the Supreme Court's decision was highlighted: "unless the case on the merits is

frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must as a general rule, consider the second and third stages ... " (at para. 28). Indeed, Robertson J.A. for the Court of Appeal stated:

> In summary, so long as motion judges are not imposing a threshold test with respect to the question of whether the plaintiff will suffer irreparable harm and so long as they are prepared to proceed to the third stage of the tri-partite analysis, and assess the potential harm to the defendant, no one can complain that the principles in RJR-MacDonald have not been respected. Whether the case for irreparable harm to the plaintiff is weak or strong, it is still necessary to turn to the third step in the analysis.
>
> (at para. 30)

[50] But, because the present case must address under the second step of the *RJR-MacDonald test* the applicant's claim that his constitutionally protected "fair trial" interests in subsequent or parallel criminal proceedings would suffer irreparable harm, it appears unavoidable that a more demanding standard, amounting to a threshold, is called for. In my respectful opinion, the distinction lies in the very special and unique nature of the harm claimed under the second step in this injunction application – the right to a fair trial – and where that determination would normally be made:

> In assessing a threatened breach of s. 11 (d) of the Charter, it must be remembered that the right to a fair trial is of fundamental importance to the criminal process. This court has already decided that the question of a breach or potential breach of the s. 11 (d) fair trial right is best determined at the time of trial: ... While this is not an absolute rule, it is a factor which complicates the task of an individual seeking to establish a prospective breach of the section as it requires a court to speculate as to whether or not the right to a fair trial will be violated when, in the future the criminal charges against the accused are brought to trial. Because it is an exercise in speculation, it will be difficult for the applicant to demonstrate the high degree of probability that a Charter breach will occur which is required to warrant relief being granted. As well it must be remembered that an applicant will always have the opportunity to apply for relief to the trial court once the prejudice, flowing ...., is more easily ascertainable and demonstrable.
>
> (Emphasis added)
>
> (***Phillips v. Nova Scotia***, supra at para. 1112)

[51] This concurring, albeit minority, judgment of the Supreme Court has been interpreted in a case involving an application for injunctive relief, as follows:

> In cases of requests for the granting of relief for a prospective *Charter* violation, the Supreme Court of Canada jurisprudence has signaled that before a court acts to restrain government action, it must be satisfied that there is a very real likelihood that an individual's *Charter* rights will be prejudiced in the absence of the requested relief.
>
> (Emphasis added)
>
> (***Corp. of the Canadian Civil Liberties Assn. v. Toronto (City) Police Service*** 2010 ONSC 3525 at para. 87)

[52] Another reason for concluding that the second step of the *RJR-MacDonald test* is a threshold in the special circumstances of this case, is because of the competing public interest, reflected in the mandate given to the College of Physicians and Surgeons, that otherwise would have to be weighed under the third step of balance of convenience. The Supreme Court has said that if a statutory authority is charged with a duty of promoting or protecting the public interest and there is some indication that the activity sought to be enjoined was undertaken pursuant to that responsibility then a court "should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" (***RJR-MacDonald v. Canada (Attorney General)***, supra at para. 71). Therefore, in my view, if a risk of irreparable harm to the applicant's fair trial interests is not established there would not be and should not be a later weighing against the respondent's public interest mandate.

[53] To put it all differently, the applicant has the public and private interest right to raise the issue of his fair trial interests at the time of any criminal trials. Indeed, this is where such determinations are generally expected to be made, in front of the judge seized with the trial (See: ***R v. Nedelcu*** 2012 SCC 59 at para. 16). Although he also has the right to seek, before any trial, relief in circumstances where he fears a prospective breach of those constitutional rights, as in the case here, it is necessarily a difficult predicative exercise. The Supreme Court has said that this demands a high standard of proof. Furthermore, in the circumstances of this case the respondent also has a jurisdictional right and a public interest mandate that would, according to the Supreme Court, be presumed to be irreparably harmed if it is restrained from exercising it. The point is that if the applicant cannot establish a sufficient risk of irreparable harm to his prospective constitutional rights then it follows that there should be no requirement to determine where the balance of convenience lays *vis* a *vis* the nature of the public interest held by the respondent.

[54] However, for reasons to be offered later, if the applicant does establish risk of irreparable harm to his fair trial rights, then it will be necessary to move to the third step. This is because, ultimately, it is the relative risks of the actual harms to the parties that need to be assessed when injunctive relief is being considered.

[55] Because of the foregoing, the second step of the *RJR-MacDonald test* is required to be modified for this case (See e.g. ***D.H.P. v. P.L.P***. (2012) 397 N.B.R. (2d) 376 (C.A.) at para. 6). As Robertson J.A. has observed: "It seems to me that the Supreme Court of Canada typically eschews the formulation of rules or frameworks which do not admit of exceptions" (***A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*** 2012 NBCA 33 at para. 81).

[56] Attempting to reconcile the authorities and relying on the strict language in ***Phillips v. Nova Scotia***, supra, and the more recent rejection in ***F.H. v. MacDougall*** 2008 SCC 531 of shifting standards of proof in civil cases in favour of one standard of proof, i.e. on a balance of probabilities, I adopt the threshold of "sufficiently serious risk" of irreparable harm, measurable by whether the applicant can establish on a balance of probabilities that his fair trial interests in the criminal proceedings will be infringed unless an injunction is granted.

a. The Requirement for Dr. Cockeram to Respond to the Registrar

[57] There are two distinct parts of the Registrar's demand on Dr. Cockeram: 1. *Answer in writing each of the allegations* 2. *Provide copies of any relevant documentation*. It is necessary to address them separately because of their somewhat different treatment under *Charter* law.

[58] In my opinion, the combined effect of the provisions of the *Medical Act* and regulations permitting the Registrar to require Dr. Cockeram to assist the Complaints Committee by responding in writing to each allegation made against him, amounts to statutory compulsion for which 'use immunity' would in all probability be expected to be provided at his pending criminal trial(s), by reason of the principles of fundamental justice found under *Section 7* of the *Charter of Rights and Freedoms*.

[59] The Court has phrased this conclusion in the fashion it has because strictly speaking it is not for this Court to ultimately decide what, if any, evidence will be admissible at any future

criminal trials involving Dr. Cockeram arising from the complaints. Those decisions can only be made by the judge seized with the trial. My task here is to assess the level of risk to Dr. Cockeram's "fair trial" interests if an injunction is not issued; not to ultimately decide the issue of admissibility.

[60] With that caveat I return to my analysis.

[61] My interpretation stands on the authority of ***R v. White*** [1999] 2 S.C.R. 417. In that case the Supreme Court explained that the principle against self-incrimination is an overarching principle within the criminal justice system that not only finds expression in certain specific procedural protections in the *Charter of Rights and Freedoms* (e.g. *s. 10 (b)*; *ss. 11 (c)*; *s. 13*), but also provides a residual protection as one of the principles of fundamental justice entrenched in *Section 7* of the *Charter* (at para. 44). The Court went on to point out, though, that the protection is not absolute; that it "demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue" (at para. 45).

[62] This contextual assessment, it was explained, is why in their earlier decision in ***R v. Fitzpatrick*** [1995] 4 S.C.R. 154 the Court did not find a violation of the principle against self-incrimination where a fisherman involved in the regulated activity of commercial fishing was statutorily compelled to make daily reports on fish catches which were later used in his prosecution under the *Fisheries Act*. The Court in ***R v. Fitzpatrick*** undertook a sophisticated analysis. For my purposes here, the principal distinguishing features are that the information provided in ***Fitzpatrick*** was generated at a time when the parties were neither in an adversarial or inquisitorial relationship and that the information was being used by the State to further its regulatory objectives of protecting the resource, i.e. by a prosecution under the *Fisheries Act*, and not for some other purpose, such as a criminal prosecution.

[63] In ***R v. White*** on the other hand, the Supreme Court found that statutorily compelled accident reports under a Motor Vehicle Act which are collected for non-litigious purposes could not be used against the person making that report in a criminal prosecution related to that incident. The Court held this would violate the principle against self-incrimination. As result, the statement maker was granted 'use immunity' in the criminal prosecution. Again, the Court conducted a sophisticated analysis. It distinguished ***R v. Fitzpatrick*** in a number ways.

Although both cases are distinguishable on their facts from the case here, nonetheless, the emphasis placed in ***R v. White*** on the existence of features of "coercion", "adversarial relationship", "unreliable confessions" and the "concern of abuse of state power" is even more pronounced in the circumstances that Dr. Cockeram faces.

[64] In many respects the parallel investigation that the College wants to embark on mirrors that conducted or being conducted by the police – both seeking to uncover evidence in support of the same allegations of 'sexual abuse', albeit for qualitatively different purposes. Except, because the applicant is a member of a regulated profession he is obligated by statute, in at least an inquisitorial if not adversarial milieu, to assist the College's investigation of him by responding to each of the allegations made. In doing this, each member is given a promise by virtue of *Section 71.2* of the *Medical Act* (in so far as the authority of that *Act* could go without being *ultra vires*) that his responses cannot be used in any proceeding falling under provincial jurisdiction, except under any *Medical Act* proceeding. For the State to then attempt to use that compelled information in a criminal prosecution is, in my opinion, a context that would engage *Section 7* ("Principles of Fundamental Justice") and *Section 24* ("Enforcement of Guaranteed Rights and Freedoms") *Charter* protections. Otherwise, the 'case to meet principle' would be violated; the criminal trial would be unfair.

[65] What all this means in the context of assessing harm under a claim for an injunction is that the applicant has failed to establish that there is a "sufficiently serious risk of irreparable harm" if he is required to respond in writing to the College's demands to answer the allegations. This is because in my assessment of the applicable constitutional law it is not probable that his responses would be permitted to be used against him in the criminal court. In my opinion, he would most probably be granted 'use immunity' if the prosecution made any such attempt (i.e., the responses themselves would not be admitted as evidence against the applicant).

[66] The second aspect of the Registrar's demand is a broad requirement that Dr. Cockeram provide copies of any relevant documentation he may have. An even closer examination of the potential impact of this aspect of the demand on the applicant's "fair trial" interests is called for. The reason is the difficulties in knowing at this time what documents this would entail, if any. Even more importantly, if there are any relevant documents the Court does not know what their character would be. To explain, I need to refer in more depth and at greater length to the treatment under the principle against self-incrimination of pre-existing documentation vs.

conscripted statements (whether oral or written).

[67] The relevant authorities were gathered and analyzed in ***R v. D'Amour*** (2002) 166 C.C.C. (3d) 477 (Ont. C.A.). The Court said, *inter alia,* that:

> ... Use of documents obtained from the appellant by the prosecution in a proceeding in which the appellant's liberty is at risk is sufficient to engage the appellant's liberty interests under s. 7 (R v. White ...; R v. Fitzpatrick ...).
>
> (at para. 30)

> It is well established that the protection afforded by the principle against self-incrimination can extend to the use in a subsequent proceeding of material previously obtained from an accused by state compulsion: R v. S. (R.J.) ...
>
> (at para. 34)

> ...The protection against self-incrimination as one of the principles of fundamental justice has also been extended to protect an accused against subsequent use of any evidence that could not have been obtained by the state but for a compelled statement or testimony given by the accused: R v. S. (R.J) ...
>
> (at para. 36)

> [The Supreme Court] also recognized that documents created under an obligation imposed by statute could attract the protection against self-incrimination ...
>
> (at para. 40)

[68] The distinction, though, is this:

> Documents that exist prior to, and independent of, any state compulsion do not, however, constitute evidence "created" by the person required to produce those documents. With certain narrow exceptions, neither the compelled production of such documents, nor the subsequent use in a criminal trial proceeding of such documents, attracts the protection of the principle against self-incrimination ...
>
> (Emphasis added)
>
> (at para. 37)

[69] One of the exceptions alluded to was described as follows:

> [The Supreme Court] also acknowledged that there were situations in which the possession of a document had a communicative component, as for example where that possession was relied on to prove that a possessor had knowledge of the contents of the document. In their view, where production had a communicative aspect, production of the document and use of it in subsequent proceedings should be approached in the same way as compelled testimony or statements ...
>
> (at para. 41)

[70] Of course, the task of trying to conduct an analysis under the forgoing legal principles would be impossible in the present circumstances. The Court simply does not know what, if any, documents relevant to the allegations would be produced if the applicant is otherwise required to comply with the Registrar's demands – did they exist independent of state compulsion; are they communicative in nature, etc.? The real risk, though, is that any such documents would have to be relevant to the purpose for which they are sought, i.e. the Complaints Committee's investigation of allegations by former patients of having been sexually abused.

[71] But, as was done in regard to written responses, this Court can trust the criminal court to appropriately protect the applicant against the admission in the criminal proceedings of any such documentation he did produce by the granting of 'use immunity', if the document(s) amount to unlawful conscription within the meaning of *Section 7* of the *Charter*. It would be for that Court to make the determination if the applicant's "fair trial" interests would be impacted.

[72] As a result of the protection that is provided in the criminal law context (*ss. 7* and *24* of the *Charter*), the applicant has failed to establish that there is a "sufficiently serious risk" of irreparable harm if an injunction is not granted.

[73] This does not end the inquiry with respect to the risks caused by the College's demands upon the applicant. Recall that it is the College's intention and obligation to share any responses given by Dr. Cockeram on each complaint with the respective complainant. Actually, disclosure to complainants forms part of the College's public interest mandate. I note in particular that upon the Complaints Committee reporting the results of its investigation to the governing Council the Registrar is required to serve, *inter alia*, the complainant "a copy of the findings and recommendations of the Committee and the order of the Council" (*Medical Act, s. 57 (10) (b)*).

The College offered no concessions for the purpose of this hearing in regard to the sharing of any of Dr. Cockeram's responses. Indeed, those complainants are not parties to this proceeding.

[74] As a result, Counsel for the applicant makes the telling point that sharing of the responses with the corresponding complainant exposes their client's right to a fair criminal trial to risk. For example, Counsel pointed out that in responding the applicant would be revealing his defence strategy, including possible witnesses and other details that he is entitled to keep unto himself until trial. During argument Counsel for the College readily and fairly conceded that it would create risk. The question for the Court is whether that risk to Dr. Cockeram's "fair trial" interests is a "sufficiently serious" one. I have concluded that it is. My reasons follow.

[75] I begin by drawing a comparison to the somewhat analogous situation facing a criminal court where, after the accused has embarked on putting a defence, the prosecution seeks to reopen its case. In criminal law such permission would be rarely given. It has been explained that:

> What is so objectionable about allowing the Crown's case to be reopened after the defence has started to meet that case is that it jeopardizes, indirectly, the principle that an accused not be conscripted against him or herself. ...
> ... there is real risk that the Crown will, based on what it has heard from the defence once it is compelled to "meet the case" against it, seek to fill in gaps or correct mistakes in the case which it had on closing and to which the defence has started to respond. To ensure that this does not in fact happen, the Crown should not, as a general rule, be permitted to reopen once the defence has started to answer he Crown's case.
>
> (***R v. P. (M.B.)***, supra at para. 42)

[76] Likewise, the responses of the applicant in the hands of the complainants (*qua* witness in the criminal proceeding) pose the "sufficiently serious" risk that an advantage could be gained or an influence exerted, in so many innumerable conscious and unconscious ways that they really do not require any delineation. Similarly, should those responses find their way into the hands of others, such as the police, the risks of an advantage are only magnified. "This harm cannot be quantified and cannot be cured" (See: ***Gore v. College of Physicians and Surgeons* (Ontario)** supra at para. 6; ***YRI-York Ltd. v. Canada (Attorney General)*** [1998] 3 F.C. 186 (C.A.) at paras. 41, 42).

[77] It is not then only the use of the applicant's response directly against him that creates a "sufficiently serious" risk to his fair trial interests (and for which I have concluded he in all probability would be afforded 'use immunity' at trial) but that risk would be exponentially elevated by the direct or indirect release of those responses to others. In the latter case those potential uses are just as objectionable to the principle against self-incrimination. Consequently, in my opinion the applicant would most probably be entitled to 'derivative use immunity' *(*See*:* ***British Columbia (Securities Commission) v. Branch*** [1995] 2 S.C.R. 3)), defined as protection against the use of evidence which could not be obtained but for compulsion of the sort that amounts to unlawful conscription:

> This residual immunity will be given recognition by the trial judge through the exercise of discretion, but exclusion will be the likely result because the self-incrimination principle demands the preservation of trial fairness.
>
> (See: ***R v. S. (R.J.)*** [1995] 1 S.C.R. 451 at para. 204)

[78] To summarize, I have concluded that the applicant would also most probably be entitled to 'derivative use immunity' over his written responses to the Registrar. He would also most probably be entitled to 'derivative use immunity' over any relevant documents he produces as part of that response if those documents implicate the principles against self-incrimination after an analysis as described in ***R v. D'Amour***, supra..

[79] However, this conclusion does not lead to the same result as it did when I earlier found the applicant's required responses (and any relevant conscripted documents) would in all probability be excluded by the judge from use at this criminal trial(s) by reason of 'simple use immunity'. This is because in the case of 'derivative use immunity' the actual derivative uses that any of the applicant's College responses could be put would be very difficult to detect and/or measure in the context of the criminal trial. As examples, would or did the applicant's response influence the complainant(s)'s (*qu*a criminal witness) testimony; if so, in what way? What, if any, advantage would or was gained by the criminal investigation authorities? As can be readily imagined, the risks are multifarious and insidious.

[80] I can come to no other conclusion than that the risks to the applicant's fair trial are real and significant. Actually, the risk of taint to the anticipated criminal proceedings from the release or dissemination of any responses Dr. Cockeram is required to give to the College would not

only jeopardize his fair trial interests but the Crown's as well, for the Crown's role is one that eschews any notion of winning or losing. Indeed, the Crown's obligations extend to also promoting an accused's right to a fair trial. Moreover, containment of the risk by the judge seized with the criminal trial would be extremely difficult, if not next to impossible considering that there are nineteen (19) complainants; the genie could not be put back into the bottle.

[81] Therefore, to this point at least, I have reached the conclusion that the applicant has made a strong case of a "sufficiently serious risk of irreparable harm" that cannot be appreciably reduced by other than an injunction prohibiting the College, at least for the time being, from requiring Dr. Cockeram to respond to its demands that he answer each of the complainants' allegations (including producing any relevant documentation).

b. Investigation by the Complaints Committee

[82] As noted at the outset, the College takes the alternative position that even if this Court were to prohibit the College from requiring Dr. Cockeram to respond to the allegations, the Court should not otherwise prevent the Complaints Committee from embarking on their required investigation. After all, theirs is a vital public interest role independent of the criminal authorities.

[83] The College argues that the Court should not "tie their hands", at least at this early stage; that Dr. Cockeram's application is premature; that it might be more appropriate for the Court to entertain an injunction application should the College proceedings reach the Board of Inquiry stage envisioned by *Section 59* of the *Medical Act*, should this be recommended following the Complaints Committee investigation. And, Counsel for the College points out that at the investigative stage the proceedings are not made public.

[84] However, the concerns the Court earlier expressed linger, that is, as to the risks arising from disclosure to the complainants of the Complaints Committee findings and recommendations, as is required by the *Medical Act, s. 57 (10) (b)*. This concern lingers because of the additional and extensive 'conscription' powers of the Complaints Committee in the course of any investigation. Not only does the Committee have the right to require Dr. Cockeram to respond to each allegation (which I have addressed); also backed by the authority to suspend or restrict his licence until he complies (*Medical Act, s. 57 (7.1)*), the Committee can "require the member to":

(a) submit to physical or mental examinations by such qualified persons as the Committee designates;

(b) submit to an inspection or audit of the practice of the member by such qualified persons as the Committee designates;

(c) submit to such examinations as the Committee directs to determine whether the member or associate member is competent to practice medicine

(d) produce records and accounts kept with respect to the member's practice or associate member's practice.

(*Medical Act, s. 57 (7)*)

[85] And:

> No member ... shall conceal or withhold from the Committee or destroy anything that may be relevant to its investigation.
>
> (*Medical Act, s. 57 (7.2)*)

[86] And:

> The provisions of this section require a member ... to produce documents or things notwithstanding any provision in any other Act or law relating to the confidentiality of medical, hospital or health records.
>
> (*Medical Act, s. 57 (7.3)*)

[87] Before continuing, I pause to reiterate that Dr. Cockeram has not challenged the College's authority and/or the extent of its powers over him in the administrative investigative context (and, in any event, see generally the opinions expressed by the Supreme Court in ***R v. Fitzpatrick***, supra, as to statutory compulsion within a regulatory scheme; See also: ***R v. Omstead*** (1988) 57 C.R.R. (2d) 342 (Ont. Ct. of Justice) at para. 38). This Court is not charged with any such wide ranging inquiry.

[88] Nor does the Court's mandate extend to assessing any procedural fairness, i.e. natural justice issues that arise, if indeed they arise at all, if this Court were to permit the Complaints Committee to continue with their investigation leading to potential findings and recommendations against the applicant and at the same time to, in effect, grant the applicant

permission not to respond to the allegations. It could be seen by some as pitching the applicant on a "Morton's Fork", i.e. requiring him to pick between equally unacceptable choices – to answer or not. Be that as it may, this Court is wrestling with arguments based on the impact of the College's processes and powers on another and separate proceeding, the criminal trial(s). It behooves the Court to keep this in mind.

[89] What this Court has attempted to do in this context of informational compulsion by statute is what was done by the Supreme Court in the context of compelled testimony given in a separate proceeding, that is, "in order to ensure compliance with these principles [against self incrimination], the court must strive to identify the extent to which they may be jeopardized by [compulsion] outside a criminal trial" (***Phillips v. Nova Scotia***, supra at para. 80). In my opinion, the above identified 'conscription' powers of the Complaints Committee pose the same or very similar untold risks to Dr. Cockeram's right to a fair criminal trial(s) as I earlier addressed in regard to the requirement that he respond to the Registrar's demand to answer the sexual abuse allegations made against him by former patients.

[90] The risk is one of 'conscription'; that if the Committee exercised any of those powers to 'press-gang' Dr. Cockeram into assisting it with the investigation for regulatory purposes, and then shared the results with the complainants, his fair trial interests could be jeopardized. I explained those "sufficiently serious" risks in the prior analysis and need not repeat them again. The concern is the same:

> The fundamental principle which guides the analysis concerning compellability is the long cherished principle prohibiting self-incrimination. ... The paramount concern is to ensure that the state is not permitted to conscript individuals against themselves. Rather, the state must always be subject to a positive obligation to establish a case to meet against the accused through other sources or only with the informed and voluntary cooperation of the accused ...
>
> (***Phillips v. Nova Scotia***, infra at para. 80)

[91] Likewise, as in the circumstance of directly compelled responses of the applicant in the hands of others, any other information obtained by the Complaints Committee from conscripting the applicant during the investigation that finds its way into the hands of others would pose unacceptable risks to a fair criminal trial; risks that would be extremely difficult or near impossible to contain by the criminal trial judge. The fact is we do not know what might be

uncovered by statutory conscription during the investigation, but at that point it would be too late.

[92] There is an additional power that can be exercised by the Complaints Committee that raises a potential fair criminal trial concern; although not strictly speaking one that impacts the principle against self-incrimination. It relates to another principle of fundamental justice under *Section 7* of the *Charter* that is given specific recognition by *Section 8*, the "right to be secure against unreasonable search or seizure". As mentioned earlier, the Registrar can appoint investigators to assist the Complaints Committee in carrying out the investigation (*Medical Act, s. 55.2 (1)*), and any such investigator:

> ... may at any reasonable time, and upon producing proof of his or her appointment, enter and inspect the business premises of a member ... and *examine anything* found there *that the investigator has reason to believe will provide evidence in respect of the matter being investigated.*
>
> (Emphasis added)
>
> (*Medical Act, s. 55.2 (2)*)

[93] The concern raised, if this authority is exercised and if *anything* is found relevant to the 'sexual abuse', is the impact on any criminal trial; if what was found was either attempted to be directly entered at the applicant's criminal trial or put to derivative uses. To be clear, this concern is not about any warrantless search and seizure powers of the Complaints Committee. It is about the impact on any concurrent or subsequent criminal trial that Dr. Cockeram faces.

[94] In my opinion, the applicant would most probably be afforded protection (i.e. 'use immunity') against the direct admission of any such item of evidence if the police authorities "piggy backed" onto the Complaints Committees powers of warrantless search and seizure: "Where a lower constitutional standard is applicable in an administrative context ... the police cannot invoke that standard to evade the prior judicial authorization that is normally required for searches or seizures in the context of criminal investigations" (***R v. Cole*** 2012 SCC 53 at para. 69; See also: ***R v. Colarusso***, [1994] 1 S.C.R. 20). I acknowledge that whether the evidence would ultimately be excluded under *Section 24 (2)* of the *Charter* would be for the trial judge after the analysis required by ***R v. Grant*** (2005), 245 C.C.C. (2d) 1 (S.C.C.). In my opinion, it is more probable than not that the trial judge would find that the admission of any such evidence would "bring the administration of justice into disrepute". To these extents the applicant has

failed to establish that there is a "sufficiently serious risk of irreparable harm" if an injunction is not granted.

[95] However, as before, it is the derivative uses of whatever may be found that is also worrisome to the concept of a fair trial. Recall again that the College is required to share their investigative findings with the complainants. Obviously this Court cannot predict if anything would be found or what it would be or if the Complaints Committee would even exercise the power given to it by *Section 55.2 (2)* of the *Medical Act*. Nonetheless, the risk of influence or informational sharing is ever-present and real; even to the extent of providing the police with investigative avenues such as the obtaining of search warrants over any information recovered. If these concerns materialize, the impact on the applicant's fair trial interests would be extremely difficult to contain by a trial judge, for the reasons given before.

[96] The result is that also under this second part of the so-called *RJR-MacDonald test* the Court finds that, without more, there is a "sufficiently serious risk of irreparable harm" to the applicant's "fair trial interests" if the Complaints Committee embarks on an investigation.

iii.) Who does the balance of convenience favour (including public interest considerations)?

[97] Even though the applicant has met the first two prongs of the injunctive test (as modified) this does not end the analysis. I mentioned this much earlier.

[98] In cases of the sort here, "the public interest is a special factor which must be considered in assessing where the balance of convenience lies and which must be given the weight it should carry" (***RJR-MacDonald v. Canada (Attorney General)***, supra at para. 64), and:

> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on that application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such effect. It must be assumed to do so. In order to overcome the assumed

> benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> (Emphasis added)
>
> (*Infra* at para. 80)

[99] Without belabouring the analysis, if the applicants fair criminal trial interests are at "sufficiently serious" risk, then this public interest must displace, to the extent it is necessary, the public interest the College is charged with administering. I need not repeat why that balance of convenience favours the applicant. And, since I have found there are such risks, the real question becomes not whether injunctive relief is necessary but, rather, the extent to which the remedy is necessary? In this regard the Court's approach must be a constrained one because of the pressing public interest represented by the College of Physicians and Surgeons and by the fact that, as we have seen, enjoining a professional regulatory body from acting within its jurisdiction is, indeed, an unusual step for a Court to take. Restraint is therefore called for.

[100] The Court, again, takes its direction from the Supreme Court:

> ..., even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected.
>
> (***RJR-MacDonald Inc. v. Canada (Attorney General)***, supra at para. 74)

[101] I begin the assessment of the scope of the relief necessary by addressing the potential impact on the public interest as protected by the *Medical Act* through the College of Physicians and Surgeons. As the Supreme Court has also said in ***RJR-MacDonald***, "public interest includes both the concerns of society generally and the particular interests of identifiable groups" (at para. 66).

[102] Obviously the interests sought to be protected by the College are far reaching and extremely important given that it involves regulating the top of the medical profession. The need for public interest protection is not only reflected in the faces of New Brunswick's citizens as a whole, but also specifically by groups and individuals such as the medical profession itself, including the Hospital Authorities around the Province and other members and associate

members of the College; and, not the least, former patients of Dr. Cockeram, including the existing complainants. All are deserving of the public interest protection offered through the College. And, but for the competing concerns identified here the College would be free to exercise their jurisdiction in the manner described.

[103] Looked at through this public interest prism, this Court must be very careful not to unduly restrict the exercise by the College of their statutory authority over Dr. Cockeram or their duty to investigate and inquire into the allegations made. At the same time, it must be recognized that the granting of injunctive relief *per se* would not completely eviscerate this aspect of the public interest, for a number of reasons. First and foremost, I have decided that to the extent they can investigate without co-opting Dr. Cockeram in the investigation the College should be permitted to do so.

[104] Furthermore, to the extent that the College would be restricted in the investigation because of the injunction, this would be ameliorated somewhat by the fact that in the concurrent criminal proceedings a public record would be made over the very same subject matter, for later use by the College should they choose. And, if there were to be a criminal conviction on any of the charges this would in itself constitute *prima facie* proof of professional misconduct upon which the College has the discretion to act (*Medical Act, s. 56*). To these extents at least the two competing public interests at play in this case can be reconciled.

[105] As well, it must be recalled that a restriction has already been placed on the applicant's medical licence by the College's Executive Committee, a restriction that as an interim measure is directly responsive to the nature of the allegations made by the former patients. This too is relevant to assessments of the impact on the public interest, including whether public confidence would be eroded (See e.g. ***Matheson v. College of Physicians and Surgeons (Prince Edward Island)*** 2009 PECA 5; ***College of Physicians and Surgeons (Ontario) v. Porter*** 2002 CarswellOnt 570; ***Litchfield v. College of Physicians and Surgeons (Alberta)*** 2007 ABQB 584).

[106] Moreover, with or without an injunction being imposed it appears that the College retains the residual authority to go further and suspend the licence or impose greater restrictions or more conditions on the applicant's licence should they consider it to be in the public interest (*Medical Act, s. 56.1 (1)*).

[107] In the end though, "justice and equity" requires the remedy of a temporary prohibitive injunction be granted for the reasons given; for it is unquestionable that a principle of our constitutional law is also that to the extents possible a court's role is not only to identify and remediate actual breaches of fundamental freedoms and rights but to prevent them.

[108] As a final aspect under this heading, I intend to comment but briefly on the College's concern for the impact of any delay arising from the imposition of an injunction. This issue is to a large measure muted given that the Court does not intend to actually stop the Complaints Committee from proceeding. Nevertheless, the effect of the injunction will be to delay the requirement that the applicant respond to the Registrar's demands that he answer the allegations made against him.

[109] As for any future claim by the applicant against the College of prejudice by reason of delay, I will only say this: Dr. Cockeram is hereby charged with that aspect of any delay arising from the issuance of this injunction. In this regard, the cases relied upon by the College (e.g. ***Misra v. College of physicians & Surgeons*** (1988) 52 D.L.R. (4th) 477 (Sask. C.A.); ***Thomson v. College of Physicians and Surgeons (B.C.)*** [1988] B.C.T.D. Uned. A35 (B.C.S.C.)) are made distinguishable.

D. Remedy

a. Extent

[110] Pursuant to the combined authority of *Rule 69.13 (4)* of the *Rules of Court* and *Section 33* of the *Judicature Act* a prohibitive injunction shall issue, directed at the College of Physicians and Surgeons of New Brunswick. The College is temporarily restrained and prohibited from exercising the following powers given it under the *Medical Act* and Regulations:

i. **Requiring the applicant to respond to the Registrar's demands as set out in the *Record on Application* at page 43 in regard to any of the nineteen (19) existing complaints lodged with the College; and the applicant's obligations to respond are suspended;**

ii. **Requiring the applicant to submit to any demands under *Sections 57 (7)* or *57 (7.3)* of the *Medical Act* or in conducting a search envisioned by *Section 55.2* of the *Medical Act* during the course of any investigation conducted by the Complaints and Registration Committee or their investigators in regard to any of the nineteen (19) existing complaints lodged with the College; and the applicant's obligations to comply are suspended;**

b. Length

[111] In light of the pleadings and the risk of harm the issuance of the injunction is intended to prevent, the injunction shall lapse forty five (45) days from the date of completion of the last criminal trial involving the nineteen complainants.

c. Other

[112] Two arguments remain.

[113] The Court has obviously not accepted the applicant's broader anticipatory type argument - that the Court absolutely prohibit the Complaints Committee from embarking on an investigation until the conclusion of the criminal trial(s) because it could lead to the matter being put before the College's Review Committee or before a Board of Inquiry or lead to a sanction being issued by Council, any of which in turn could impact on the applicant's fair trial interests in any criminal proceeding. In the words of Counsel for the applicant, the Complaints Committee investigation "sets in motion a process that will fundamentally impair Dr. Cockeram's right to a fair trial".

[114] The nature of the remedy of injunctive relief is inherently discretionary and fact dependant. For the reasons given before, a principle of restraint infuses any exercise of this discretion. Furthermore, I find the respondent's counter argument compelling - that should the investigation lead to the recommendation of other processes, such as a Board of Inquiry, then the applicant is free to apply to the Court to prohibit the College at such later stage. Actually, different considerations may apply.

[115] To repeat, the remedy of a temporary prohibitive injunction is discretionary and fact dependant. The Court has addressed the applicant's claims in the context of the College's present Complaints Committee investigative stage. I agree with Counsel for the College that any further considerations would be premature.

[116] The last argument to address is the applicant's claim that the injunction should also apply to any additional 'like' complaints that are filed with the College in the future. I am not prepared to extend the injunction that far for similar restraint reasons. If additional complaints are filed, I leave it to the good sense of the parties' legal advisors to resolve the matter in light of this Court's decision. Importantly though, they would retain the freedom to apply to the Courts. Predicting the risk to the applicant of prospective *Charter* violations in the face of the existing complaints and the College's processes has been difficult enough for the Court, without also embarking on predicting what future complaints, if any, would entail or their impact or whether they would even lead to criminal charges.

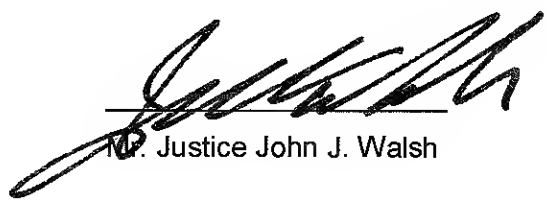
VII. Costs

[117] There has been mixed results on the claims. Given all the circumstances, the parties shall bear their own costs.

VIII. Directions

[118] The Court requests Counsel for the applicant, in consultation with Counsel for the respondent, to draft and present an Order for my signature reflecting with sufficient specificity the remedy granted herein. Should any issues arise on the specific wording, the parties are granted leave to appear for directions by arranging with the Clerk a date and time.

DATED at the City of Saint John, N.B. this 10th day of June 2013



Mr. Justice John J. Walsh